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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
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13
14 SONY CORPORATION,

15 Plaintiff,

16 v.

17 VIZIO, INC.,

18 Defendant.
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Case No. 08-01135(RGK)(FMOx)

**VIZIO, INC.'S MEMORANDUM
OF POINTS AND
AUTHORITIES OPPOSING
SONY CORPORATION'S EX
PARTE APPLICATION FOR
LEAVE TO FILE ITS SUR-
REPLY IN SUPPORT OF ITS
OPPOSITION TO VIZIO'S
MOTION TO FILE ITS
PROPOSED AMENDED
ANSWER, AFFIRMATIVE
DEFENSES AND
COUNTERCLAIMS.**

23 For a second time in this litigation, Sony has filed an *ex parte* application that
24 does not comply with this Court's rules and procedures governing *ex parte* relief.
25 No extraordinary relief is at stake, and Sony has not demonstrated that it will suffer
26 any prejudice if it is not granted leave to file its Sur-Reply In Support of its
27 Opposition to Vizio's Motion to File its Proposed Amended Answer, Affirmative
28 Defenses and Counterclaims (hereafter "Sony's proposed sur-reply").

1 This Court's standing Order clearly states that "*ex parte* applications are
2 solely for extraordinary relief" and that "[s]anctions may be imposed for misuse of
3 *ex parte* applications. See *Mission Power Engineering Co. v. Continental Casualty*
4 *Co.*, 883 F.Supp. 488 (C.D. Cal. 1995)." (J. Klausner Standing Order re: Newly
5 Assigned Cases.) As the *Mission Power Engineering* decision makes clear, "[e]x
6 parte motions are rarely justified," and are "inherently unfair" when, as here, they
7 are filed not to secure legitimate extraordinary relief but instead in an effort to gain
8 tactical advantage. 883 F.Supp. at 490. Moreover, Sony's *ex parte* application fits
9 squarely within the mold criticized by the *Mission Power Engineering* court as
10 "debilitat[ing] the adversary system." *Id.*

11 Sony's sur-reply makes two fundamental points: (1) they believe Vizio
12 mischaracterizes the settlement discussions and (2) they wish to explain why they
13 filed a declaratory judgment action in another court involving the very same patents
14 at issue here in Vizio's pending motion to amend. Filing a sur-reply in an attempt
15 to explain additional factual differences on a topic fully briefed by the parties in no
16 way qualifies for extraordinary relief. Additionally, Sony's desire to explain its
17 forum shopping activities to the Court not only fails to rise to a level of
18 extraordinary relief, but is further evidence of Sony's engagement in the very
19 "gamesmanship" criticized in the *Mission Power Engineering* opinion. *Id.*

20 **I. Sony's Version of the Settlement Discussions Does Not Justify a Sur-**
21 **reply, But Confirms Vizio's Description of the Settlement Discussions.**

22 Sony's introduction of settlement discussions in its opposition papers invited
23 Vizio's response to those allegations. Now, Sony would like to cast Vizio's
24 response as a source of inaccurate new factual information in support of its *ex parte*
25 application. Reply evidence is not new where the "Reply Brief addressed the same
26 set of facts [in] the opposition to the motion but provides the full context to [the
27 opposing party's] selected recitation of the facts." *Terrell v. Contra Costa County*,
28 232 Fed. Appx. 626, 629 n.2 (9th Cir. 2007). Indeed, under the second prong of the

1 *Mission Power Engineering* test, Sony's *ex parte* application should be rejected
2 because Sony cannot now claim that it "is without fault in creating the crisis that
3 requires *ex parte* relief."

4 Furthermore, although Sony's proposed sur-reply disputes Vizio's
5 descriptions of the licensing negotiations regarding the possibility of a "cross
6 license" between the parties, that argument is purely semantic, as evidenced by
7 Sony's own papers. First, in the Supplemental Siegel Declaration accompanying
8 Sony's memorandum, Mr. Siegel concedes that as part of the transaction he
9 proposed, "Vizio would be required to . . . give a royalty-free grant-back of rights...
10 to Vizio patents." (*See* Supp. Siegel Decl. ¶ 4.) (Docket No. 62-2.) Moreover,
11 Sony's proposed sur-reply confirms that, as part of Sony's proposed "for fee"
12 license, Vizio would have to "give Sony a royalty-free grant-back of rights, subject
13 to certain exclusions, to Vizio patents necessary to make and sell color televisions."
14 (*See* Sony's proposed sur-reply at 2.) (Docket No. 62-3.) In other words, Sony
15 contemplated a form of a cross-license between the parties. This confirms rather
16 than contradicts Vizio's description of the settlement discussions in its Reply
17 papers.

18 Additionally, Sony's papers indicate that Sony withdrew its previous
19 settlement offer after Vizio indicated that it wanted royalties for a license under its
20 recently acquired patents. This further supports Vizio's position that an agreement
21 on the patents-in-suit in this action cannot be reached without at the same time
22 reaching an agreement on the Vizio patents asserted in Vizio's Proposed Amended
23 Answer, Affirmative Defenses and Counterclaims. This confirms that any
24 settlement between the parties must include both Sony's and Vizio's patents, again
25 corroborating rather than contradicting Vizio's position regarding cross-license
26 negotiations between the parties. (*See* Wamsley Decl. ¶¶ 2-11.) (Docket No. 59-2.)
27 In sum, Sony's actions and the supplemental Siegel declaration serve to underscore
28 why Vizio's motion to amend should be granted.

1 **II. Sony's Forum Shopping Only Supports Vizio's Request That the Full**
2 **Patent Dispute Between Vizio and Sony Should be Heard by This Court.**

3 Sony's sur-reply attempts to explain to this Court that it was somehow
4 justified in filing a declaratory judgment action of non-infringement of Vizio's
5 patents in the Southern District of California, even while it knew that Vizio's
6 motion to amend concerning four of the same patents was pending in this Court.

7 By filing another action in another district, however, Sony is attempting to
8 forum shop and subvert the ongoing process in this Court. Sony is trying to put the
9 dispute over Vizio's patents into a forum with local patent rules in which the parties
10 can expect a longer time to trial than if Vizio's motion to amend is granted. Such
11 gamesmanship should not be allowed. Moreover, Sony's forum shopping is
12 particularly inappropriate given its earlier successful motion to transfer Vizio's
13 first-filed New Jersey action to this District, purportedly in an effort to consolidate
14 all of the parties' pending disputes in one forum. Moreover, Sony's conduct in
15 filing a declaratory judgment action is exactly the type of forum shopping Vizio
16 was trying to avoid during meet and confer discussions between the parties
17 regarding Vizio's motion to amend its answer and counterclaims. (See Wamsley
18 Decl. ¶¶ 2-7.) There is no reasonable justification for Sony's actions which only
19 further support Vizio's assertion in its Reply brief that the full patent dispute
20 between the parties should be heard by this Court.

21 **CONCLUSION**

22 For the foregoing reasons, defendant Vizio respectfully requests that:
23 (1) Sony's *Ex Parte* Application be denied, and (2) the Court decide Vizio's Motion
24 to File its Proposed Amended Answer, Affirmative Defenses and Counterclaims on
25 the papers previously submitted to this Court under the regular noticed motion
26 procedures.
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Dated: May 18, 2009

JONES DAY

By: /s/ Lena Bacani
Lena N. Bacani

Attorneys for Plaintiff
VIZIO, INC.

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I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, 50th Floor, Los Angeles, California 90071. On May 18, 2009, I served a copy of the within document(s):

**VIZIO, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES
OPPOSING SONY CORPORATION'S EX PARTE APPLICATION FOR
LEAVE TO FILE ITS SUR-REPLY IN SUPPORT OF ITS OPPOSITION
TO VIZIO'S MOTION TO FILE ITS PROPOSED AMENDED ANSWER,
AFFIRMATIVE DEFENSES AND COUNTERCLAIMS**

11 I am familiar with the United States District Court, Central District of
12 California, Western Division's practice for collecting and processing electronic
13 filings. Under that practice, documents are electronically filed with the court. The
14 court's CM/ECF system will generate a Notice of Electronic Filing (NEF) to the
15 filing party, the assigned judge, and any registered users in the case. The NEF will
16 constitute service of the document. Registration as a CM/ECF user constitutes
17 consent to electronic service through the court's transmission facilities. Under said
18 practice, the following CM/ECF users were served:

kevinjohnson@quinnemanuel.com

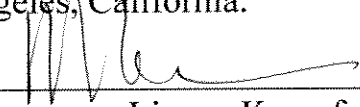
stevenanderson@quinnemanuel.com
rorymiller@quinnemanuel.com

1 On May 18, 2009, I also served a courtesy copy, pursuant to the agreement
2 between the parties, by e-mail to opposing counsel at:

3 sony-vizio@quinnemanuel.com

4 I declare that I am employed in the office of a member of the bar of this court
5 at whose direction the service was made.

6 Executed on May 18, 2009, at Los Angeles, California.

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9 Linnea Kempf
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